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CLEARINGHOUSE RULE 00-189

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. The statutory provisions referenced in the analysis under “statutory authority” should be compared with the statutory provisions listed in s. Ins 25.01. Presumably, the references should be consistent. The reason for inclusion of some of the references is not self evident.

b. The last paragraph under the portion of the analysis discussing protection of nonpublic personal health information indicates that the health information provisions of the rule do not apply to licensees who are in compliance with health information privacy regulations promulgated pursuant to the Health Insurance Portability and Accountability Act. The analysis notes that these regulations will not be effective for two years. Section Ins 25.77 states if a licensee complies with all requirements of the federal regulations, “except for its effective date provision,” the licensee is not subject to the provisions of subch. V of the proposed rule. It is not clear whether subch. V is intended to apply to such licensees before the federal rules become effective. If it is intended that certain licensees are exempt from the rule, based on assumptions as to what the federal rules will be (i.e., are exempt from subch. V immediately), delegation issues may be raised.

2. Form, Style and Placement in Administrative Code

a. It is conceded: (1) that uniformity among the states concerning compliance with federal privacy rules is desirable; and (2) that, given the subject matter of the rule, a degree of

complexity and resort to technical terms and terms of art is unavoidable. However, the choice to use the National Association of Insurance Commissioners (NAIC) model as the basis of the rule results in a rule that is a substantial departure from accepted drafting style in this state. While many differences in form and style arguably are of little consequence, some of the differences make the rule awkward and unnecessarily difficult to read: (1) including substance in definitions; (2) including in substance commentary that more properly should be placed in notes; and (3) assuming some titles are substance. Further, the overall organization and sequence of provisions of the rule are poor and a number of provisions are awkwardly drafted. Many deficiencies can be traced to the extremely awkward use of “examples.”

Examples of less consequential departures from standard form and style include inconsistent use of subunit titles and use of parentheses.

Because it is assumed that the Office of the Commissioner of Insurance will continue to use the NAIC model as a basis of the rule, most of the style deficiencies observed in the rule relating to form and style will not be noted in these comments.

b. Given the length of the rule, the analysis is cursory. For example, there is no discussion of the kinds of information included in “nonpublic personal financial information.” While the analysis, as far as it goes, does a good job of summarizing a complex rule, consideration should be given to expanding the analysis to include more substance.

c. The definition of “consumer” in s. Ins 25.04 (6) (a) is particularly awkward.

d. Section Ins 25.04 (6) (b) 4. a. creates subunits below the subparagraph level. This is to be avoided in rule drafting and, consequently, divisions (i) to (iv) should be collapsed into subpar. a.

e. In s. Ins 25.04 (11) (b) 3., the parentheses should be replaced by commas. [The entire rule should be reviewed for this problem.]

f. Section Ins 25.04 (18) should include “(18)” before reference to “(a).”

g. Reference to a “few” examples in s. Ins 25.15 (3) (b) 1., lacks specificity; can a more definite requirement be provided? See also, par. (c) 2.

h. Appendix A contains a number of “sample clauses.” These should be refenced in notes to the corresponding provisions of the rule.

i. It is assumed that when the rule is sent to the Legislature for standing committee review, it will contain a final regulatory flexibility analysis. [See s. 1.02 (6), Manual.]

j. Section Ins 25.70 (2) refers to additional insurance functions that may be added with the approval of the commissioner. When these additional functions are known, they should be promulgated as part of ch. Ins 25.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the first narrative paragraph of the analysis, “achieve” should replace “achieving” in the last sentence.

b. The first narrative paragraph of the analysis indicates that the objective of the NAIC in preparing the model legislation on which the rule is based is to achieve uniformity with the federal privacy rules for “financial” information. How, then, does the portion of the rule relating to protection of nonpublic personal health information relate to the NAIC model and the federal privacy rules?

c. In the first paragraph of the analysis under “protection of nonpublic personal financial information,” the acronym “TPA” should be spelled out.

d. In the last paragraph, first sentence, of the analysis under “protection of nonpublic personal financial information,” “apply” should replace “applies.”

e. It is not clear where in the rule it is made clear that an insurer is responsible for ensuring that its agents are in compliance with s. 610.70, Stats., as asserted in the last sentence of the first paragraph of the analysis under “protection of nonpublic personal health information.” Section Ins 25.80 does not provide what the analysis indicates.

f. Under “additional provisions,” the analysis indicates that the rule includes provisions prohibiting the sharing of account access information. Is the analysis referring to s. Ins 25.40? If so, under the rule, that provision is included in the limits on disclosures of financial information under subch. III. It is not clear why that provision is separated from that portion of the analysis discussing protection of nonpublic personal financial information.

g. Section Ins 25.02 (1) (intro.) indicates that the chapter governs the treatment of specified information about individuals by “all” licensees. However, certain licensees are not governed as specified by the provisions of subch. V of the rule.

h. The purpose and effect of s. Ins 25.02 (3) is unclear.

i. In s. Ins 25.04 (2) (b) 3. (intro.), should “ensure” be “ensures”?

j. In s. Ins 25.04 (6) (b) 5. (intro.), it appears that the word “a” should be inserted before the word “workers’.”

k. In s. Ins 25.04 (8) (c), one element of the definition of “control” is the power to exercise a controlling influence over the management or policies of the company, “as the commissioner determines.” There is no standard provided for the commissioner to make that determination.

l. In the examples included with the definition of “customer relationship” in s. Ins 25.04 (10) (b) 2., it appears that “consumer” and “individual” are inconsistently used. Based on

the introductory clause of subd. 2., it appears that “consumer” should be used throughout the examples.

m. In s. Ins 25.04 (16) (b), “an” should be substituted for “a” preceding “insurance.”

n. In s. Ins 25.04 (20) (a), there is nothing in the definition of “personally identifiable financial information” that links the specified information to “financial” information; i.e., as drafted, any kind of information provided or obtained as specified in the definition could be considered “financial information.”

o. In s. Ins 25.15 (3) (b) 1. (intro.), the phrase “These might” should be replaced by the phrase “Examples may.” In sub. (3) (c), the phrase “using more detailed categories” is used. More detailed than what categories? Finally, this section contains two subsections that are numbered “(5).”

p. Section Ins 25.17 (1) (b) 1. (intro.) refers to “adequate notice” that the consumer can opt-out. There is reference in sub. (1) (a) (intro.) to a “clear and conspicuous notice” that “accurately explains the right to opt-out.” However, there is no express requirement of an “adequate” notice.

q. Section Ins 25.17 (1) (b) 1. a. contains the cross-reference “as described in s. Ins 25.15 (1) (b) and (c).” The referenced provisions do not “describe” anything.

r. Section Ins 25.17 (4) (b) and (c) should be compared for consistency. Paragraph (b) allows either option; par. (c) seems to say that if the second option is chosen, then the first one applies as well.

s. Is s. Ins 25.17 (4) (d) intended to refer to an opt-out direction from a joint consumer only?

t. In s. Ins 25.20 (2) (a) (intro.), “any” is misspelled.

u. Section Ins 25.25 (2) (a) (intro.) fails to indicate what notice or notices are being referred to. Compare par. (b) (intro.), which refers to notice of “privacy policies and practices.”

v. Section Ins 25.25 (3) (b) refers to a customer requesting a licensee to refrain from sending any information regarding the customer relationship. Should the rule address how and when this may occur?

w. In s. Ins 25.30 (1) (b), the referenced rules should be preceded by “ss.”

x. In s. Ins 25.30 (2) (b), should reference be made to “other than as permitted in ss. Ins 25.50, 25.55 and 25.60”?

y. In s. Ins 25.35 (2) (b) 2., a space should be provided between the “n” and “s” in “ins.” See also sub. (4) (intro.), s. Ins 25.25 (5) (a) and sample clauses A-5 and A-6 in this regard.

z. It appears that s. Ins 25.60 (1) (e) 2. does not grammatically follow the introductory clause.

aa. Section Ins 25.60 (3) is meaningless. It appears to be intended to follow an introductory clause but there is no introductory clause.

ab. The cross-reference in s. Ins 25.73 (2) should be clarified. Is reference to a disclosure authorization under s. 610.70, Stats., intended to be limited to the purposes specified under s. 610.70 (2) (b), Stats.?